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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-628

JOHN HUTTER,

Petitioner,

vs.

LAKE VIEW TRUST AND SAVINGS BANK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ILLINOIS SUPREME COURT.

**BRIEF OF RESPONDENT IN OPPOSITION
TO THE PETITION FOR CERTIORARI**

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I. THE PETITION FOR CERTIORARI

On October 19, 1978, Respondent, Lake View Trust and Savings Bank ("Lake View") received a Petition for writ of certiorari (the "Petition") filed in the above entitled case by John Hutter ("Hutter"). Hutter's Petition was captioned "October Term, 1977," although it failed to include a docket number, a certificate of filing, or proof of service. On November 1, 1978, Lake View discovered that Hutter's Petition had been filed with this Court and assigned Docket No. 78-628.

II. OPINION BELOW

Hutter's Petition seeks review of the decision of the Illinois Appellate Court, First District, Fifth Division, rendered November 4, 1977, affirming the trial court, and the decision of the Illinois Supreme Court rendered on March 30, 1978, denying Hutter leave to appeal. The appellate opinion is reported at 54 Ill. App. 3d 653, 12 Ill. Dec. 423, 370 N. E. 2d 47 (1977). The denial of leave to appeal by the Illinois Supreme Court (Case No. 50256) was not reported. Copies of both opinions are appended to Hutter's Petition as Appendix pages 1 through 8.

III. ARGUMENT

A. Hutter's Petition Contains No Grounds for Invoking the Jurisdiction of This Court.

1. No Federal Question Was Decided by the Courts Below.

Hutter ostensibly bases his claim for jurisdiction in this Court on an alleged deprivation of "due process" (Pet. p. 2), thereby attempting to bring himself within the ambit of the jurisdictional statute, 28 U. S. C. § 1257 (1978). In pertinent part, this statute provides:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * *

"(3) By writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The opinion of the Illinois Appellate Court shows that no federal question was raised or decided in that forum or in the trial court. Hutter maintains he was denied "due process", but the courts below merely ruled that he had failed to plead irreparable injury (Case No. 76-1473; Pet. Appendix p. 5); that he had failed to plead sufficient facts to show a "homestead interest" (Pet. Appendix p. 4); and that he had two actions pending against Lake View for the same cause (Case No. 76-1683; Pet. Appendix pp. 6-7). Each of these holdings was based entirely on state law.

This Court often has stated that appellate jurisdiction fails unless it appears affirmatively from the record that a federal question was either raised in or decided by the state courts. *Cardinale v. Louisiana*, 394 U. S. 437, 438 (1969). In *Whitney v. California*, 274 U. S. 357, 360 (1927), Mr. Justice Sanford stated:

"It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a Federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court."

Even Hutter's claim of due process fails to raise a federal issue. The Illinois Constitution of 1970 contains a due process clause in Article I, Section 2:

"Section 2. Due Process and Equal Protection

"No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."

Hutter's arguments below do not clarify whether he asserts the mantle of federal or state due process. It is settled law that a petitioner must show that some provision of the federal, as distinguished from the state, constitution was relied upon. *New York Central and Hudson River R. R. Co. v. City of New York*, 186 U. S. 269, 273 (1902). Where it is left

uncertain whether the claim is based on a provision of the state constitution, the federal constitution, or both, no basis for review by this Court exists. *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 68 (1928). Indeed, in *Bowe v. Scott*, 233 U. S. 658 (1914), this Court dismissed a writ of error for want of jurisdiction after the petitioner had alleged that denial of an injunction would lead to a taking of his property "without due process". Mr. Chief Justice White stated:

"But it is settled that such an averment, making no reference to the Constitution of the United States, and asserting no express rights thereunder, is solely referable to the state Constitution, which, in this instance, has a due process clause, and affords no basis whatever for invoking the jurisdiction of this court. *Miller v. Cornwall R. Co.*, 168 U.S. 131, 42 L.ed. 409, 18 Sup.Ct.Rep. 34; *Harding v. Illinois*, 196 U.S. 78, 49 L.ed. 394, 25 Sup.Ct.Rep. 176."

233 U. S. at 665.

Although Hutter's Petition directs itself to the Fourteenth Amendment of the Federal Constitution (Pet. p. 2), it is now too late for him to raise a federal due process issue. Where a constitutional question is raised for the first time in the Supreme Court, it is "necessarily excluded" from consideration. *White River Lumber Co. v. Arkansas ex rel. Applegate*, 279 U. S. 692, 700 (1929).

It is submitted that Hutter's Petition should be dismissed because no federal question was raised or decided below.

2. The State Court Proceedings Are Not Sufficiently Final To Be Reviewed by This Court.

To be reviewable by this Court, state court proceedings must be sufficiently final so that further proceedings will not render this Court's ruling superfluous. *Cf. Clark v. Kansas City*, 172 U. S. 334, 336-337 (1899). If a decree below leaves the entire case to be disposed of on the merits at some later date, jurisdiction in the Supreme Court is improper. *Moses v. Mayor*, 15 Wall. 387 (1873); *Gibbons v. Ogden*, 6 Wheat. 448 (1821).

In this case, Hutter's Petition for injunctive relief was denied (Case No. 76-1472), but his case in chief was transferred to another court for hearing on the merits (Pet. Appendix p. 2). And, in No. 76-1683, Hutter's counterclaim was dismissed, but only because Case No. 76-1472 was pending seeking the same relief against Lake View on the same set of facts (Pet. Appendix pp. 6-7). Neither of the cases has yet been heard on the merits, and neither is sufficiently final for this Court to review the issues Hutter raises at this time.

B. The Issues Raised in Hutter's Petition Are Not of Sufficient Substance to Justify Grant of Certiorari.

This Court often has stated that even if jurisdiction is proper, there must be "special and important" considerations which require grant of certiorari. *Rice v. Sioux City Memorial Park Cemetery*, 349 U. S. 70, 74 (1955). "Importance" means importance to the public, not importance merely to the persons involved. *Magnum Import Co. v. Coty*, 262 U. S. 159, 163 (1923). Rule 19 of the Rules of Practice of this Court reiterates this substance requirement:

"19. Considerations Governing Review on Certiorari

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court. * * *

Despite these mandates, Hutter's Petition makes no showing of any issue of sufficient import to cause this Court to grant certiorari. To the contrary, the case to date has been decided entirely on the basis of its particular facts: Hutter has not pleaded

facts entitling him to injunctive relief, has not pleaded facts demonstrating a "homestead interest", and has attempted to plead the same facts requesting the same relief against the same defendant in two separate cases. Hutter's facts merely present minor issues of state procedural law which at this early stage of the proceedings have little impact on Hutter, much less on the realm of federal constitutional law. Indeed, the merits of the cases below have not yet been reached nor the issues joined.

It is submitted that Hutter's Petition fails to present issues of sufficient substance or import to require this Court to grant certiorari.

**C. Adequate State Grounds Exist to Support the Decision
Below Without Reference to Any Federal Issues.**

Where adequate state grounds sustain the decision below, this Court will not review the judgment. *Berea College v. Kentucky*, 211 U. S. 45, 63 (1908); *Fox Film Corp. v. Muller*, 296 U. S. 207, 210 (1935). The opinion of the Illinois Appellate Court clearly reveals that adequate state grounds support that decision. Hutter failed to comply with Illinois' pleading requirements both that he plead irreparable injury in order to entitle him to injunctive relief (Pet. Appendix p. 5) and that he plead adequate facts to show he had a homestead interest in certain of the property involved (Pet. Appendix p. 5). And, Hutter plainly brought himself within the purview of Section 48(1)(c) of the Illinois Civil Practice Act (Ill. Rev. Stat. 1975, ch. 110, ¶ 48(1)(c)) when he attempted to allege two actions against Lake View for the same cause. Transgression of these state requirements was more than sufficient to justify the result below without reference to any federal questions or issues.

IV. CONCLUSION

For the foregoing reasons, Hutter's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

VICTOR L. LEWIS,
ROBERT C. CHRISTENSON,
115 South LaSalle Street,
Chicago, Illinois 60603,
Counsel for Respondent.

Dated: November 17, 1978.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of November, 1978, three copies of Respondent's Brief in Opposition to the Petition for Certiorari were mailed, postage prepaid, to John Hutter, Respondent, at the following address: Rt. 1, Sturgeon Bay, Wisconsin 54235; and 3526 N. Marshfield Avenue, Chicago, Illinois 60657.

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Robert C. Christenson